IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 380 OF 2006

IN

OFFICIAL LIQUIDATOR'S REPORT DATED 21ST AUGUST, 2000 IN

COMPANY PETITION NO. 703 OF 1996

M/s Sakshi Food, A registered Partnership firm Having its registered office at 2433/34, Survey No. 999, Telikhunt, Ahmednagar - 414 001	]]]]]	Appellant (Ori. Lessee)
V/s		
1) Orissa Concrete Allied Industries Limited, A Company incorporated under the Companies Act having its Office at 3rd Floor, Gokhale Road, Calcutta - 700 000	]]]]]	(Org. Petitioner)
2) Official Liquidator High Court Mumbai, appointed as Official Liquidator of M/s Agritech Hatcheries & Foods Limited (in Ltgn.) having his office at Bank of India Bldg., M.G. Road, Mumbai	]]]]]]]	
3) M/s Transasia Global Limited a Company incorporated under the Companies Act having its office at Hyderabad	]]]]	(Org. Purchasers) Respondents.

WITH

APPEAL NO. 381 OF 2006

IN

COMPANY APPLICATION (L) NO. 336 OF 2006

IN

COMPANY PETITION NO. 703 OF 1996

M/s Sakshi Food,]
A registered Partnership firm]
Having its registered Office at] Appellant
2433/34, Survey no. 999,] (Org.Applicant)
Telikhunt, Ahmednagar - 414 001]

Versus

1) Orissa Concrete Allied Industries]
Limited.]
A Company registered under the]
Companies Act, 1956 having its]
Registered Office at 3rd Floor,]
Gokhale Road, Calcutta- 700 020.]

2) M/s Agritech Hatcheries & Food]
Limited, (In Liquidation)](Org.Respondents)
through the Official Liquidator] RESPONDENTS
High Court, Bombay.]

Mr. V.A. Thorat, Sr. Advocate with Narayan Sahu i/b S.K. Srivastava & Co. for Appellant

Mr. P.K. Samdani with Ms. Merlyn Monterio for respondent No. 2.

Ms. Poonam Naik i/b Shaunak Satpute & Co. for repondent No. 3.

CORAM : KSHITIJ R. VYAS, CHIEF JUSTICE &

ABHAY S. OKA, J.

DATE : 10TH JULY, 2006

P.C.

1. Both these appeals arise out of common order dated 31st March, 2006 passed by the learned Single Judge, by which the Official Liquidator's report dated 21st August, 2000 and Company Application (L) No. 336 of 2006 have been disposed off. Therefore these

appeals can be conveniently decided by a common judgment.

2. By order dated 17th July, 1997, the learned Single Judge of this Court appointed Court Receiver, High Court as a Receiver of all the assets of M/s Agritech Hatcheries & Food Limited (a Company under Liquidation). On October 1st, 1997, this Court appointed Official Liquidator as a provisional liquidator of the said Company. The Appellant claims to be in possession of a Broiler Farm located at Baburdi, Division No. 9, Tal. & Dist. Ahmednagar under an alleged Agreement of Lease dated 13th September, 1996 executed by the Company under liquidation. In order dated 22nd October, 1997, the learned Single Judge noted that the Appellant was claiming leasehold rights in respect of Farm no. 9. The learned Single Judge directed that the Official Liquidator will take only formal possession of the said farm. The Appellant was directed to deposit Rs.1.00 Lac with Provisional Liquidator. The learned Single Judge directed that after taking physical possession of the assets of the Company under Liquidation, he shall explore the possibility of leasing the farms on royalty and security basis by issuing advertisements in Newspapers.

3. On 13th August, 2004, the Official Liquidator submitted report before the learned Company Judge. The

Official Liquidator in the said report referred to order dated 5th October, 2000 passed by this Court on earlier report dated 14th September, 2000. By the said order, Undertaking of the Appellant to pay arrears of Rs.11.00 Lacs in five equal instalments was accepted by this Court. The said report dated 14th September, 2000 was filed earlier by the Official Liquidator pointing out that there was default on the part of the Appellant in making payment at the rate of 1.00 Lac per month. In the Report dated 13th August, 2004, the Official Liquidator sought directions regarding deposit of Rs.52.00 Lacs. for the period from April 2000 till the end of July 2004 at the rate of 1.00 Lac per month by the Appellant. A direction was also sought regarding handing over of the possession of the property by the Appellant to the Official Liquidator on account of non payment of rental charges.

4. The learned Single Judge by the impugned order made the report dated 13th August 2004 absolute in terms of prayer clauses (a) and (b). The learned Single Judge granted time of three months to the Appellant to handover physical possession of the property to the Official Liquidator subject to filing an Undertaking as mentioned in the order by the Appellant within a period of two weeks.

5. When these appeals came before the Court on 22nd June, 2006, we directed the Appellant to deposit

Rs.20.00 Lacs with a Prothonotary and Senior Master with a view to test bona fides of the Appellant. We also granted liberty to the parties to move the learned Single Judge for speaking to the minutes of the impugned order. Today we are informed that a sum of Rs.20.00 Lacs has been deposited by the Appellant. A copy of Order dated 3rd July, 2006 passed by the learned Single Judge is placed on record. The said order was passed on application for speaking to the minutes. By the said order, the learned Single Judge clarified that the order impugned has been passed on the report of the Official Liquidator dated 13th August, 2004.

6. The learned senior Counsel appearing for the Appellant submitted that at no stage any order was made for appointing the Appellant as the Agent of the Official Liquidator. He submitted that the learned Single Judge has proceeded on erroneous footing that admittedly the Appellant was appointed as the Agent of the Official Liquidator. He submitted that the concession allegedly made by the learned counsel appearing for the Appellant before the Single Judge which is recorded in the impugned order has been incorrectly recorded. He submitted that in fact no adjudication has been made on the claim of the Appellant that the Appellant has been inducted as a lessee by the Company under Liquidation much before the appointment of Receiver and the appointment of

provisional Liquidator. He invited our attention to the reports earlier submitted by the Official Liquidator and certain letters on record which clearly show that even according to the Official Liquidator the Appellant was never appointed as an Agent and the Appellant continued to be the lessee of the plot. He submitted that unless rights of the Appellant are adjudicated, order of eviction cannot be passed. He pointed out that under the order passed by the Debt Recovery Tribunal, the property of the Company under liquidation including the property in possession of the Appellant has been sold in favour of the Respondent no. 3 and instead of Respondent no. 3 taking out appropriate proceedings, the Official Liquidator is acting on behalf of the said purchaser.

7. The learned senior Counsel appearing for the Official Liquidator submitted that it was conceded before the learned Single Judge by the Appellant's Counsel that the Appellant was the Agent of the Court Receiver. He submitted that once it is accepted that the appellant acted as the Agent, the fact that Agency Agreement is not executed is not relevant. He submitted that the Appellant has not paid any amount from April, 2000 and Appellant is a gross defaulter and therefore no interference can be made with the impugned order. The learned counsel appearing for the respondent No. 3 purchaser supported the impugned judgment and order.

8. We have carefully considered the submissions made by the learned counsel appearing for the parties. It will be necessary to refer to relevant paragraphs of the impugned order. In Paragraph Nos. 2 and 3, the learned Single Judge has observed thus :

> "2. It is not in dispute that one M/s Sakshi Foods was allowed by the Official Liquidator to continue in possession of an immovable property which belonged to the Company in liquidation as his Agent and of which the Official Liquidator stood appointed. There were terms drawn up under the agency agreement and it is not in dispute that M/s Sakshi Foods have accepted them. The Liquidator seeks above directions in the light of the fact that there is a default committed in payment of the monthly amount which was directed to be paid as part of the agency agreement. In other words, it is upon this payment that M/s Sakshi Foods were appointed as agents of the Official Liquidator.
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> 3. The Official Liquidator has in the report invited my attention to the letters addressed from time to time by the agent disputing its liability to pay the amount. There is prolonged correspondence and it is not

necessary to refer to the same, because in my view, the Official Liquidator is right in his submission that there is a default committed by M/s Sakshi Foods and the payment which is sought to be forwarded unilaterally by them, after making some deductions, cannot be accepted in full and final settlement of the dues under the agency agreement. Under the agency agreement a sum of Rs.1,00,000/- per month was the agreed quantum and it is not disputed by Mr. Merchant, learned Senior Counsel appearing for M/s Sakshi Foods that the amount is not paid regularly and there is a default. However, certain adjustments being claimed, Mr. Merchant’s request is that M/s Sakshi Foods be allowed to pay a sum of Rs.15 Lacs and then approach the liquidator for certain concessions and/or adjustments".

9. In Paragraph no. 4 and 5, the learned Single Judge has observed thus :

"4. This matter was adjourned to enable Mr. Merchant to take instructions. All that Mr. Merchant could state today, after taking instructions, from the representative of M/s Sakshi Foods who is present in court, is that a sum of Rs.4,00,000/- would be paid immediately and sum of Rs.11,00,000/- would be paid within

a period of 8 weeks from today.

5. In my view the dues are for a period commencing from April 2000 to July 2004 at the rate of Rs.1,00,000/- per month. The quantum works out to Rs.52,00,000/-. There are subsequent developments in as much as at the instance of certain secured creditors, this property was put up for sale by the DRT and now the sale is complete. Therefore, the Liquidator will have to take physical possession of this property from his agent and the said agent is liable to hand over the same in the light of the default admittedly committed by it. The submissions pertaining to the right of the agent to remain in possession in terms of certain lease agreement cannot be gone into as I am considering the request of the Official Liquidator on the report".

10. While adjourning the hearing of these appeals on 22nd June, 2006, we had granted liberty to the parties to move the learned Single Judge for speaking to the minutes. On the basis of the said liberty, both the Official Liquidator and the Appellant applied for speaking to the minutes before the learned Single Judge. The note filed by the Appellant on 3rd July, 2006 for order as to speaking to the minutes has been placed on record by the Appellant along with an

additional compilation. It is pertinent to note that the Appellant has not at all sought clarification as regards the concession recorded by the learned Single Judge of the learned counsel appearing for the Appellant in Paragraphs 2, 3 and 5 of the impugned order. In Paragraph No. 2, the learned Single Judge has recorded that it is not in dispute that the Appellant is allowed by the Official Liquidator to continue in possession as his Agent. It is recorded that the terms drawn up under the agency agreement have been accepted by the Appellant. In Paragraph 3 of the impugned order, the learned Single Judge has stated that under the agency agreement, a sum of Rs.1.00 Lac per month was the agreed quantum and that it was not disputed by the learned counsel appearing for the Appellant that the amount was not paid regularly and there is a default. In fact a submission has been recorded of the learned counsel for the Appellant that subject to deposit of Rs.15.00 Lacs, the Appellant may be permitted to apply for certain concessions or adjustments.

11. It is a well settled position of law that the statements recorded by the Court reflecting undisputed position between the parties as well as other factual statements recorded in the order of the Court recording as to what transpired in the Court are final and if according to any party if there are any factual errors committed by the Court, the same should be got

rectified by making necessary application to the same Court. As stated earlier, we had granted an opportunity to the parties to approach to the learned Single Judge. In the Application which is filed by the Appellant before the learned Single Judge, no clarification is sought as regards the undisputed position which is recorded in the order. No clarification is sought before the learned Single Judge about the statement of the learned counsel recorded in the impugned order. Therefore, now in appeal, we cannot permit the Appellant to contend that the aforesaid statements of fact recorded by the Single Judge are incorrect.

12. There does not seem to be any dispute that the Appellant was liable to pay Rs.1.00 Lac per month whether by way of lease rent or royalty. It is also not in dispute that though the appellant is in possession from April, 2000 onwards, the Appellant has not made any payment. As of today the amount payable by the Appellant is to the tune of Rs.74.00 Lacs out of which the Appellant has paid only Rs.20.00 Lacs. When we asked the learned Counsel appearing for the Appellant before us whether the Appellant was willing to deposit the entire amount due and payable at the rate of Rs.1.00 Lac per month within the time fixed by this Court, on instruction the learned counsel stated that the Appellant is not in position to do so. Even if it is assumed that the lease agreement relied upon

by the Appellant is a genuine agreement, it is pertinent to note that the same provides for lease rent of Rs.1.00 Lac per month subject to deduction of Income Tax. The alleged agreement of lease records that the same was for a period of 3 years from 15th September, 1996. It must be noted here that in order dated 22nd October, 1997, the learned Single Judge has noted that the Company under liquidation did not disclose to this Court the fact that the alleged lease agreement has been executed in favour of the Appellant in the year

1996. The alleged lease agreement is not a registered document.

13. Considering the admitted position as reflected from the impugned judgment and order, it is obvious that under the agreed terms of the agency agreement, the Appellant had agreed to pay Rs.1.00 lac per month and there is a default from April, 2000. In view of this position, it is difficult to find fault with impugned judgment and order. Accordingly the appeal is dismissed.

14. On the prayer made by learned counsel appearing for the Appellant, we direct the Official Liquidator not to take possession for a period of six weeks from today.

(KSHITIJ R. VYAS, CHIEF JUSTICE)

(ABHAY S. OKA, J.)